

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF HARNEY

IN THE MATTER OF THE ADJUDICATION)
OF THE RELATIVE RIGHTS TO THE USE)
OF THE WATERS OF RATTLE SNAKE CREEK)
-----)

No. 3168

DECREE

Now at this time the above entitled matter coming on to be heard on objections and exceptions to the Findings and Order of Determination of the State Engineer and for Decree herein and the Court having heard the arguments of counsel for various exceptors and objectors to said Findings and Order of Determination and having read and considered Briefs filed herein and being now advised in the premises;

IT IS CONSIDERED, ORDERED AND DECREED:

a. That the exceptions and objections of all claimants, be, and they hereby are disallowed and denied except as hereinafter allowed in whole or in part.

b. That the proceedings of the State Engineer in this matter, be, and they are hereby approved.

c. That the Findings and Order of Determination of the State Engineer as filed in this Court are hereby made the Findings and Order of Determination and Decree of this Court, subject, however, to the following modifications:

I

That the part of Paragraph 16 of said Findings and Order of Determination entitled "Clendennen Tract" shall be and is hereby modified to read as follows:

Clendennen Tract. This tract includes the SE $\frac{1}{4}$ of Section 19, Township 22, South, Range 32 $\frac{1}{2}$ East W. M. and the records show that the west portion was included in the S $\frac{1}{2}$ in the Military Post Reservation of Camp Harney which was restored to the public domain on September 13th, 1882. It appears that Clinton A. Ensley made first settlement on the tract in the fall of 1882 and filed and recorded a Notice of Appropriation of Water for Irrigation Purposes. The testimony does not show that the Notice was posted. However, it appears that some land in the tract was irrigated in 1883. There is no testimony as to the custom prevailing in that section at that time but this Court will presume that the necessary steps were taken, such as posting of the Notice of Location on the stream and the doctrine of relation will be applied herein. It further appears

that Clinton A. Ensley occupied this tract until the winter of 1884-1885 when Clendennen secured possession and continued to irrigate the land and that in 1904 Joseph Clark purchased the tract which at that time had an irrigated area of approximately the same as in 1936 and it appears that the irrigated area was greatly enlarged from the year 1883 until the year 1904 and that the testimony in this cause discloses that the Clendennen tract was recognized generally as having first right to the use of the waters of East, Middle and West Forks of Rattle Snake Creek.

The land in the Clendennen tract is allowed a water right with a priority of 1882 for the area as follows and tabulated herein: 2.2 acres from the Middle Fork and 0.7 acres from the East Fork in the $SE\frac{1}{4}$ of the $SE\frac{1}{4}$; 15.9 acres from the East Fork and 11.6 acres from the Middle Fork and East Fork in the $NE\frac{1}{4}SE\frac{1}{4}$; 33.1 acres from the West Fork and 6.9 acres from the Middle Fork in the $NW\frac{1}{4}$ of the $SE\frac{1}{4}$; 3.6 acres from the East Fork, 23.5 acres from the Middle Fork and 12.9 acres from the West Fork in the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ all in Section 19, Township 22 South, Range $32\frac{1}{2}$ East, W. M.

II

That the part of Paragraph 16 entitled "George and Belle James" shall be and hereby is modified to read as follows:

George and Belle James. Contestees George and Belle James filed Proof No. 7, claiming a right to the use of the water of Rattle Snake Creek for domestic and stock purposes and the irrigation of 8 acres in the $NE\frac{1}{4}NW\frac{1}{4}$, 4.8 acres in the $SE\frac{1}{4}NW\frac{1}{4}$, 5.8 acres in the $NE\frac{1}{4}SW\frac{1}{4}$, and 3.8 acres in the $SE\frac{1}{4}SW\frac{1}{4}$, Section 8, and 7.5 acres in Lot 7 ($NW\frac{1}{4}NW\frac{1}{4}$), 8.6 acres in Lot 6 ($SW\frac{1}{4}NW\frac{1}{4}$), Section 17, and 1.7 acres in Lot 9 ($NE\frac{1}{4}NE\frac{1}{4}$), and 19.9 acres in the $SE\frac{1}{4}NE\frac{1}{4}$, Section 18, Township 22 South, Range $32\frac{1}{2}$ East, W.M.

The priority claimed is 1871 for land in Sections 17 and 18 and 1882 for the land in Section 8. A right by adverse use is also claimed.

The right for land in Section 8 as set forth in Proof No. 7 is contested as to the date of priority and on the grounds that the use of water thereon has not been continuous for each irrigation season. The water right for land in Sections 17 and 18 is contested as to priority, it being alleged in the statement of contest that no water right could be initiated prior to the time the land was restored to the public domain. A Notice of Water Appropriation for the land in Section 8 was filed in 1885. There is no proof on the question of whether or not the custom in the appropriation of water requiring the posting of the Notice at the place of proposed diversion or appropriation was adopted in this area at that time, on the other hand there is no proof as to whether or not this was done by the appropriator. However, 52 years had elapsed between the time of the appropriation and the date of this hearing and this water right having been exercised during that entire period of time without previous contest and in the light of the difficulty of establishing, after more than half a century, this fact by oral evidence the

Court is entitled to presume that the appropriation of water by one Burns, the original appropriator was made in accordance with the law and customs of that time.

The contestees George and Belle James are allowed a water right for the land in Section 8, Township 22 South, Range 32 $\frac{1}{2}$ East, W. M. as described in Proof No. 7 with a priority of 1885 as tabulated herein.

The land in Sections 17 and 18, for which a water right is claimed by contestees George and Belle James in Proof No. 7, was originally the north half of the area included in the Military Post of Camp Harney which appears to have been abandoned as a military post in 1879 and restored to the public domain in 1900. It appears that after 1879 various parties occupied the post grounds upon which were some improvements; that T. B. James, father of contestee George James, began the construction of a ditch for the purpose of irrigating the land in 1888; that the ditch was completed in 1889, and that some of the land in this tract was irrigated in 1888; that T. B. James occupied this tract in 1889, and subsequently secured title from the government.

A right for the irrigation of the land in Sections 17 and 18, as described in Proof No. 7, is allowed with a priority of 1888. It does not appear that the use of water for irrigation of the land under Proof No. 7 has been such as to secure a right by adverse use.

III

Paragraph 20 is hereby modified and amended to read as follows:

Duty of Water and Head of Water. The source of practically all of the water which flows in Rattle Snake Creek is from snow and as the drainage area lies at a comparatively low elevation there is normally little or no water available for irrigation after June 15. It appears that in an average year there is no water flowing in Rattle Snake Creek below the division control located in Section 19, Township 22 South, Range 32 $\frac{1}{2}$ East, W.M., after July 15. The beginning of the irrigation season must of necessity commence with the time water is first available or the spring runoff begins which it appears in some years occurs in February or March. Due to the fact that there are no reservoirs constructed to store the early flood water and it is necessary to use the water whenever it is available, no irrigation season is fixed. Taking into consideration all testimony and evidence introduced in this proceeding, together with the time and manner of the runoff, the character of the land and crops grown, the duty of water is fixed so as not to exceed three acre-feet per acre during any year, the head of water shall not exceed one second foot for each 25 acres of land to be irrigated. Provided, however, that no appropriator shall be charged with water which passes over or through such appropriator's land and becomes available for the use of a lower appropriator, and such lower appropriators respectively shall be charged with all return flow or waste water which shall enter

their ditches or lands and shall be consumed in the irrigation of their lands. The water master having the duty of administration of the water of Rattle Snake Creek is hereby authorized and directed to require the installation of such gates and weirs as will enable him to keep a substantially correct record of the charges and credits to be made under this provision.

IV

That Paragraph No. 23 entitled "Stock and Domestic Use" is hereby modified to read as follows:

Stock and Domestic Use. It appears that practically all of the claimants to the use of the waters of Rattle Snake Creek in this proceeding have shallow wells equipped with wind mills from which they pump water for stock and domestic use. The supply from this source appears to be sufficient for all the uses. Furthermore, during a considerable portion of each year Rattle Snake Creek is dry and no water would be available from this source for stock and domestic use. Therefore it is ordered that all claims for water for livestock and domestic purposes are hereby denied.

V

That Paragraph No. 24 entitled "Failure of Water to Flow in Channel" is hereby stricken in its entirety.

d. That Paragraphs 25 to 28 both inclusive shall be renumbered in this Decree. That Paragraph 25 in the Order of Determination shall be No. 24 in this Decree, Paragraph 26 shall be No. 25, Paragraph 27 shall be No. 26, and Paragraph 28 shall be No. 27.

e. That the tabulation of water rights shall be changed so that the date of relative priority of the water right decreed George and Belle James for lands in Section 8, Township 22 South, Range 32 $\frac{1}{2}$ E. W. M. shall read 1885 instead of 1888 as now appears in said tabulation.

f. That the tabulation of water rights shall be changed so that the date of relative priority of the water right decreed to Julia Clark in Section 19, Township 22 South, Range 32 $\frac{1}{2}$ E. W. M. shall read 1882 instead of 1883 as now appears in said tabulation.

g. That the tabulation of water rights shall be changed so that the number of acres of the lands having a water right to be decreed to Julia Clark in the Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Nineteen (19), Township Twenty-two (22) South, Range 32 $\frac{1}{2}$ E. W. M. out of the West Fork of Rattle Snake Creek shall read

33.1 acres instead of 15.1 acres as now appears in said tabulation.

Done and dated in chambers on this, the 2nd day of December, A. D. 1940.

(signed) ARTHUR D. HAY
Circuit Judge

STATE OF OREGON)
) ss
County of Harney)

I, WM. M. CARROLL, County Clerk and Clerk of the Circuit Court of the County and State aforesaid, do hereby certify that the foregoing copy of DECREE in the Matter of the Adjudication of the Relative Rights to the Use of the Waters of Rattle Snake Creek has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original Decree as the same appears of record at my office and in my custody.


IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 4th day of December, 1940.

Wm. M. Carroll, Clerk.

STATE OF OREGON)
) ss
County of Marion)

I, CHAS. E. STRICKLIN, State Engineer of the State of Oregon, do hereby certify that the foregoing copy of decree in the matter of the determination of the relative rights to the use of the waters of RATTLE SNAKE CREEK is a full, true and correct copy of such decree as the same was received in this office and entered of record herein this 5th day of December, 1940.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of December, 1940.


Chas. E. Stricklin, State Engineer.